Supreme Court, U.S.
FILED
AUG 12 1998
OFFICE OF THE CLERK

No. 97-1817

IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

SMILAND PAINT COMPANY, *et al.*,
Petitioners,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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PETITIONERS' REPLY BRIEF

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INTRODUCTION

In this reply brief, petitioners respond to four new points raised by EPA in its opposition brief: (1) EPA improperly attempts to recharacterize the petition; (2) EPA's new point about the statutory issue is erroneous; (3) EPA's new point about the ripeness issue is erroneous; and (4) EPA incorrectly argues that the petition will soon become moot.

I. RECHARACTERIZATION OF PETITION

EPA attempts to recharacterize the legislative mandates and litigation claims involved in the case to such an extent that a reply is required.

Legislative Mandates. EPA generally construes Section 183(e) as a direction "to promulgate regulations" of, or a requirement "to begin regulating," products which emit organic compounds. Opp. 2. It sees the Section 183(e) process as a single "ongoing rulemaking." Opp. I, 4, 7, 8, 12. It characterizes the study and list mandated by Congress as preliminary steps taken "during the course of a rulemaking." Opp. 4, 7. In particular, EPA describes the required study as "an informational study on the potential magnitude of the problem." Opp. 3, 8, 10. Then, EPA says, it must issue what it calls a "timetable" for regulating. Opp. 3, 5, 7.

The study and the list mandated by Section 183(e) are not simply preliminary steps of one "ongoing rulemaking." Instead, each is a mandatory step in a three-phase regulatory process, compliance with each of which is a necessary prerequisite to commencement of the next. Indeed, the final phase does not consist of one rulemaking, but many, all based on the same omnibus study and list.

The initial part of the study is much more than "an informational study of the potential magnitude of the problem." It is to be a study of emissions of hundreds of organic compounds from thousands of products in numerous non-attainment areas to determine whether and to what extent each such compound has the potential to contribute to ozone non-attainment in any such area. The other part of the mandated study is the establishment of

regulatory criteria, taking five specified factors into account.

The mandated list is not merely a regulatory "timetable," but the methodology by which, based on a complying study, EPA is to determine which products will not be subjected to any regulation at all and, as to all other products, whether they will be regulated in the first, second, third, or fourth group.

Petitioners' Claims. EPA asserts that the claims described in the petition are a "guise" for, and present "merely a semantic recasting" of, petitioners' true claims. Opp. 12. In fact, petitioners' claims are precisely as described in the petition. It is EPA's opposition brief which mischaracterizes the claims petitioners attempt to present for adjudication.

First, EPA tells this Court: "The claim here is not that EPA has . . . refused to issue its study . . ." Opp. 11. But petitioners do, in fact, charge that EPA refused to issue the study (and the list) mandated by Congress.

Second, EPA contends that petitioners merely challenge the "substance" of its 1995 report. Opp. 2, 12. It states that petitioners allege that the report was "deficient," "inadequate," or "[un]satisfactor[y]." Opp. 7, 11, 12, 13. EPA argues that petitioners' complaint "amounts to a quarrel with [its] exercise of discretion in choosing an appropriate methodology. [citation]" Opp. 12. In particular, EPA asserts that petitioners charge that it did not "properly" or "adequately" consider the five statutory factors. Opp. 6, 7. In fact, petitioners allege that EPA is guilty of unlawful inaction which must be judicially compelled, not inadequate action which must be judicially reversed.

Third, EPA represents that petitioners also challenge the substance of the "proposed architectural coatings rule," itself. Opp. 2, 12. It states that petitioners attempt to use Section 304(a)(2) to provide judicial review of the "proposed rule." Opp. 10, 13. EPA claims they allege that the "proposed rule" is deficient. Opp. 7, 11. EPA implies that petitioners sue because they are dissatisfied with its interpretation of its statutory duties in an-

nouncing "a proposed rule." Opp. 7.[1] EPA's representations are false. Petitioners' claims do not, and could not, seek review, let alone reversal, of the non-existent architectural coatings rule.

Fourth, EPA states that petitioners are prosecuting their suit "to enjoin EPA from proceeding with its rulemaking." Opp. 6. It contends that they attempt to use Section 304(a)(2) to "*enjoin* issuance of the final rule." Opp. 10. (Emphasis in original). This, too, is misleading. The District Court had explicit jurisdiction under Section 304 only "to order [EPA] to perform" its study and listing duties. 42 U.S.C. § 7604(a). Such a mandate is the principal form of relief sought by petitioners.[2]

II. STATUTORY ISSUE

Conflict of Circuits. As to the question of the proper interpretation of Section 304 in light of Section 307, EPA argues that the interpretation applied in the Ninth Circuit does not "conflict" with that applied in the D.C., Second, Third, and Sixth Circuits, as none of the cases from those circuits supports the principle that citizen suit jurisdiction provides a basis for mandatory injunctive relief in the first-step inaction context. Opp. 7, 9-10. In particular, EPA

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[1] As discussed below, EPA also bases its new mootness argument on the supposition that petitioners challenge the "proposed rule." Opp. 7, 13. Indeed, EPA even states the purported issue as if petitioners seek judicial review of "a proposed rule." Opp. I.

[2] Certain courts have held that, where nondiscretionary acts are the initial steps in a multi-step process, a district court may compel performance of the nondiscretionary duty and also enjoin the subsequent steps until the mandated predicates have first been performed. *E.g., Seattle Audubon Society v. Evans*, 771 F.Supp. 1081, 1096 (W.D. Wash. 1991) affirmed, 952 F.2d 297 (9th Cir. 1991) (mandatory injunction requiring the Forest Service to adopt guidelines and prepare an EIS, supplemented by prohibitory injunction forbidding the Forest Service from awarding timber sales in the meantime); *Seattle Audubon Society v. Moseley*, 798 F.Supp. 1484, 1493-94 (W.D. Wash. 1992) affirmed sub nom. *Seattle Audubon Society v. Espy*, 998 F.2d 699 (9th Cir. 1993) (mandatory injunction requiring Forest Service to cure EIS defects, supplemented by prohibitory injunction preventing any timber sales in the meantime).

argues that foreclosing such relief does not create a "bureaucratic limbo" or "twilight zone" where "EPA is proceeding apace with promulgating" final rules, and that seeking such relief "is designed to interfere with and disrupt that process." Opp. 10.

A bureaucratic limbo or twilight zone does, indeed, exist here, and will continue to exist. It is EPA which is interfering with and disrupting the three-phase process mandated by Congress. It is doing so by proceeding apace to the third phase without having performed, as mandated, the first two necessary prerequisites. The facts of this case fall squarely within the interpretation followed in the D.C., Second, Third, and Sixth Circuits and, therefore, a conflict of the circuits does exist.[3]

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[3] On the merits of this jurisdictional question, should certiorari be granted, EPA asserts that the statutory interpretation followed by the Ninth Circuit is "correct." Opp. 7, 12. It cites *Bennett v. Spear*, 117 S.Ct. 1154 (1997). Opp. 8. But that case strongly suggests that the Ninth Circuit's approach is not correct. At issue there was jurisdiction under the citizen suit provision of the Endangered Species Act which authorizes suit for failure to perform a nondiscretionary duty. The ESA mandated that the government "shall" designate critical habitat in a biological opinion "on the basis of the best scientific data available and after taking into consideration the economic impact, and any other relevant impact," of specifying any particular area. Plaintiffs complained of the "omission" of these impacts from the biological opinion. 117 S.Ct. at 1166. This Court held that the district court had citizen suit jurisdiction, saying: "It is rudimentary administrative law that discretion as to the substance of the ultimate decision does not confer discretion to ignore the required procedures of decisionmaking. [citations]" *Id.* In order to imply an exception to Section 304 jurisdiction covering the first two steps simply because any action under the third step might be reversed under Section 307, this Court would demand a far clearer expression of Congressional intent. *Simpson Pulp Co. v. Costle*, 445 U.S. 193, 197 (1980). The expansive language offers no indication whatever that Congress intended the limiting construction of Section 304. *Harrison v. PPG Industries, Inc.*, 446 U.S. 578, 589 (1980). ". . . [I]t requires an artificial statutory construction to read a general grant of a right to judicial review begrudgingly, so as to cut out agency actions that a literal reading would cover." *Abbott Laboratories v. Gardner*, 387 U.S. 136, 145 (1967).

Important Issue. EPA concedes that "Section 304 provides a basis for relief from agency inaction in the face of a mandatory duty." Opp. 4, 7-8. Yet it still suggests that it is unimportant to decide whether potential Section 307 jurisdiction trumps actual Section 304 jurisdiction in the first-step inaction context. EPA asserts that Section 307 "effectively ensures" that there will be a later opportunity for judicial review of all final product regulations. Opp. 3. EPA notes that Section 307(d)(9)(A) allows review of a regulation which is "not in accordance with law." Opp. 3. The D. C. Circuit may "reverse" such a regulation. 42 U.S.C. § 7607(d)(9). But even if all of the 21 product regulations EPA has scheduled for promulagtion in the next eight years were to be reviewed by the D.C. Circuit in 21 separate actions and all 21, because they had not been based on a statutory study and list, were reversed, the study and list mandated by Congress would still not exist. The 15 groups of products explicitly exempted from regulation in EPA's 1995 schedule, plus the numerous other products exempted *sub silentio*, will never be the subject of regulation and, therefore, circuit court review. No court will ever pass on EPA's failure to study and list those products which should have been, but were not, listed for regulation and should, but will not, be regulated.

EPA also argues more specifically that petitioners "will be able" to obtain judicial review of the final rule relating to architectural coatings and that the D.C. Circuit will have "ample authority" to consider (unspecified) substantive and procedural challenges to that final rule. Opp. 9. But, for the five reasons discussed in the petition, any opportunity to obtain an effective order directing EPA to perform its study and listing duties under Section 183(e) is likely to prove illusory. Pet. 23-25.

III. RIPENESS ISSUE

Conflict of Circuits. EPA contends that the ripeness rule applied by the Ninth Circuit in the first-step inaction context does not "conflict" with the D.C. Circuit rule. Opp. 7, 9, 11. EPA claims that the D.C. Circuit cases

cited in the petition deal with "a fundamentally different type of legal claim than that of petitioners." Opp. 11. It states that petitioners are seeking "premature judicial review of nonfinal agency action. [citation]" Opp. 1. EPA contends that its 1995 report and schedule were "nonfinal," implying that it might later perform its as yet unperformed study and listing duties. Opp. 5.

Self-serving statements by an agency to the effect that inaction is not final and a mandatory duty may later be performed are not binding on the courts. *Albertson v. subversive Activities Control Board*, 382 U.S. 70, 76 (1965); *American Petroleum Institute v. EPA*, 906 F.2d 729, 739-40 (D.C. Cir. 1990). Adjudication is not premature where agency inaction has become "definitive" and "effective." *Abbott Laboratories*, 387 U.S. at 151.

Here, EPA's report was formally published a year-and-a-half after the statutory deadline for a complying study. That report merely stated that, "collectively," products contribute to ozone non-attainment, a fact assumed by Congress in enacting Section 183(e). It purported to establish regulatory criteria, considering only two of the five statutory factors and relying mainly on two non-statutory factors. The report was used to prepare EPA's schedule, which determines which products are to be regulated, and when, and which ones are to be exempted. That schedule, which ignores reactivity, was then published in the Federal Register. EPA published the report and schedule more than three years ago. Since that time, EPA has done nothing to perform the nondiscretionary study and listing duties at issue in this case. What it has done is propose, without having first performed such duties, three of the regulations set out in the first group in the schedule.

The D.C. Circuit would have held EPA's inaction to be ripe for judicial review. The Ninth Circuit regards such inaction as unripe. This conflict of the circuits should be resolved.[4]

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[4] As to the merits of the ripeness issue, should certiorari be granted, EPA aserts that the Ninth Circuit rule is "correct." Opp.

Important Issue. Despite EPA's suggestions to the contrary, whether claims to compel the mandatory initial steps in a multi-step governmental process are ripe is an important issue. Both parties discuss this Court's extensive ripeness jurisprudence. Pet. 20; Opp. 7-9. Whether petitioners' study and listing inaction claims are ripe prior to regulation is of comparable importance to the other ripeness issues this Court has previously heard, and should now be decided to fill a large lacuna in existing law.[5]

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7. The case on which it mainly relies, *Ohio Forestry Assn. v. Sierra Club*, 118 S.Ct. 1665, 1670, 1672 (1990), is readily distinguishable. First, *Ohio Forestry* found that withholding court consideration of the general plan until after specific projects were approved would not cause hardship to the environmental plaintiffs. *Id.* at 1670-71. Here, by contrast, the placement of products, including architectural coatings, on EPA's schedule, especially in the first group (not to mention the proposal of a rule) gravely stigmatizes petitioners' products, alters research and development, and affects market choices. Second, *Ohio Forestry* concluded that there was a real possibility that the government might "revis[e]" and "correct" the mistakes in the plan. *Id.* at 1671. Here, it is manifest that EPA has no intention to perform the study and listing duties omitted from its 1995 report and schedule. Third, *Ohio Forestry* noted that the environmentalists' claim that the plan's analysis was "erroneous" would enmesh the court in "time-consuming judicial consideration of the details of an elaborate, technically based plan." *Id.* at 1669, 1671. In the case at bar, petitioners merely claim that certain analyses mandated by Congress have never been performed and were totally omitted from the report and schedule. Fourth, *Ohio Forestry* did not involve a statute which "guarantees a particular procedure." *Id.* at 1672. Here, Section 183(e) mandates a particular study and list as necessary prerequisites to making any specific regulatory decisions. Where EPA fails to perform study or listing duties mandated in clean air legislation as a prelude to government regulation, judicial intervention is not premature. *Flue-Cured Tobacco Cooperative Stabilization Corp. v. EPA*, 857 F.Supp. 1137, 1141-45 (M.D.N.C. 1994).

5 EPA suggests that if certiorari is granted and the Court reverses the Ninth Circuit's two jurisdictional holdings, petitioners will nevertheless lose their substantive claims in the district court on the merits. EPA asserts that it acted "in accordance with the congressional directives." Opp. 4. It repeatedly asserts that it completed the "study" mandated by Congress. Opp. 2, 4, 5, 7, 11,

IV. MOOTNESS POINT

Finally, EPA makes this new point: "EPA intends to promulgate the final architectural coatings rule in the near future, and once the final rule is issued, petitioners' challenge to the proposed rule will become moot. Further review by this Court is therefore not warranted." Opp. 7, 13. EPA's new mootness point is erroneous.

In particular, EPA refers to the case of *Sierra Club v. Browner*, Civ. No. 97-1984-PLE (D.D.C. filed Aug. 29, 1997). Opp. 13. In that case Sierra Club sued EPA, in the District Court for the District of Columbia to compel it to adopt three proposed regulations, including one relating to architectural coatings, and others identified in the first group of EPA's schedule. On March 3, 1998 petitioners moved to intervene in that case as a party defendant in an effort to insure that the District Court did not order EPA to promulgate any regulations unless and until EPA had first performed its study and listing duties. Petitioners argued that they, as parties threatened with regulation, were entitled to intervene under Rule 24 of

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12. Specifically, EPA states that its report concluded that emissions of organic compounds of all types from all "products" as a group have the potential to contribute to ozone non-attainment in at least some non-attainment areas. Opp. 4. It asserts that, in establishing regulatory criteria in its report, it "explained how it evaluated each of the five factors" specified by Congress. Opp. 4. Finally, the EPA claims that it published a "list." Opp. 5. However, the undisputed evidence in the District Court, testimony of leading scientific and economic experts, showed that the study and list mandated by Congress do not exist. Judicial relief will be granted where EPA fails to obey congressional study mandates under clean air legislation as a prelude to governmental regulation of products. *Flue-Cured Tobacco Cooperative Stabilization Corp. v. EPA*, —— F.Supp. ——, 1998 WL 408884 (M.D.N.C. 1998). EPA twice notes that the Ninth Circuit stated that petitioners "have not demonstrated that the EPA has failed to perform any nondiscretionary duty. [citation]" Opp. 6-7, 12. But where, as here, a case is dismissed for lack of jurisdiction, any statement about the merits is "dicta and therefore not persuasive." *Maryland National Bank v. Madam Chapel*, 46 F.3d 895 (9th Cir. 1995). In such event, "there can be no preclusive findings or conclusions on the merits." *Aero-Lineas Argentinas v. U.S.*, 77 F.3d 1564, 1572 (Fed. Cir. 1996).

the Federal Rules of Civil Procedure. *Natural Resources Defense Council v. Costle*, 561 F.2d 904, 908-11 (D.C. Cir. 1977); *Conservation Law Foundation of New England v. Mosbacher*, 966 F.2d 39, 43-44 (1st Cir. 1992); *Sierra Club v. Glickman*, 82 F.3d 106, 109-10 (5th Cir. 1996). Petitioners further argued that district courts have supplemental jurisdiction to entertain intervenors' defenses in suits against the government. *International Mortgage & Investment Corp. v. Von Clemm*, 301 F.2d 857, 863-64 (2nd Cir. 1962); *Chalmers v. U.S.*, 43 F.R.D. 286, 291 (D. Kan. 1967). On July 15, 1998 the District Court denied intervention, holding that regulated parties have no "protected interest in the defendant's side." Petitioners filed a notice of appeal to the D.C. Circuit on July 24, 1998.

On July 15, 1998 the District Court also filed a consent decree signed by Sierra Club and EPA ordering EPA to "promulgate" the three proposed regulations, including the one relating to architectural coatings, "no later than August 15, 1998," and three other regulations, no later than December 1, 1998. However, the decree provides that EPA may modify such dates or amend its schedule.

As discussed above, petitioners did not challenge, and could not have challenged, "the proposed rule" in the District Court below, as EPA erroneously asserts in the mootness context. Opp. 7, 13. They sought—and seek—an order directing EPA to perform its study and listing duties, because rational rulemaking as to any product is impossible unless EPA first does so. Even if EPA really means that petitioners' actual claims below, as opposed to the claims EPA here invents, are "moot," then EPA is mistaken for the following reasons.

The possibility that a subsequent mooting action will occur does not, itself, render a claim moot. *Group Against Smog & Pollution v. EPA*, 665 F.2d 1284 n. 58 (D.C. Cir. 1981). Here, no rule promulgation has yet occurred, and it may not occur.

In any event, a claim against EPA is not mooted by its subsequent action where the alleged violation may continue

unabated thereafter. *Dow Chemical Co. v. EPA*, 605 F.2d 673, 679-80 (3rd Cir. 1979). Here, even if EPA promulgates a final regulation outlawing architectural coatings, its unlawful inactions (failures to conduct the mandated study and establish the mandated list) will continue unabated thereafter. Performing such duties will continue to be a necessary prerequisite to corrective amendments to any prematurely adopted rules and also to adoption of all future rules.

Furthermore, a suit against EPA is not mooted by EPA action giving rise to a second suit when the second is not certain to afford the full measure of relief available in the first. *Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519, 535 n. 14 (1978); *League to Save Lake Tahoe v. Trounday*, 598 F.2d 1164, 1166 n.2 (9th Cir. 1979) cert. denied, 444 U.S. 943 (1979); *Sierra Club v. Train*, 557 F.2d 485, 488 (5th Cir. 1977). Here, for the five reasons stated in the petition, EPA's failure to perform its study and listing duties under Section 183(e) may not be adequately remedied by subsequent review and reversal of the architectural coatings ban, or any other regulations, under Section 307. Pet. 23-25.

Finally, agency action forcing a plaintiff to institute a second suit in another forum does not moot the first case instituted in the plaintiff's choice of forum. *Ten Mile Industrial Park v. Western Plains Service Corp.*, 810 F.2d 1518, 1522 (10th Cir. 1987). In the case at bar, it was petitioners' desire to pursue this claim in a Section 304 action in California and, if that section authorized the suit and it was ripe, as they will show if certiorari is granted, then their choice of forum cannot be negated by administrative action taken by EPA in the interim.

CONCLUSION

For these reasons, the new points in EPA's opposition brief lack merit.

Respectfully submitted,

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Dated: August 12, 1998